(3)

No. 84-751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LONNIE LEWIS, Petitioner

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

RESPONDENT ECKDAHL WAREHOUSE CO.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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38 pp

QUESTIONS PRESENTED

1. Where an employee has been terminated by his employer due to the loss of a particular customer's business and the unavailability of substitute work, may the employee obtain judicial review of his breach of collective contract claim if his union does not join the non-signatory former customer in a grievance proceeding against the employer?

2. A. Is the decision of the Court of Appeals for the Ninth Circuit consistent with this Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967), in its determination that the union breached no duty of fair representation where it failed to grieve against the employer's former customer, which was not a signatory to any collective bargaining agreement?

B. Is the decision of the

Court of Appeals consistent with this Court's decision in Vaca v. Sipes, supra, in its determination that an action for breach of a collective bargaining agreement cannot be brought against an employer's former customer, which was not a signatory to a collective bargaining agreement, because the former customer did not "repudiate" a grievance procedure in which it was never invited or directed to participate?

3. If the employer's former customer was found to have engaged in "deception" concerning its status as a co-employer of the discharged employee, should the decision in Vaca v. Sipes, supra, be reconsidered, insofar as it precludes the discharged employee from obtaining judicial review?

PARTIES TO THE PROCEEDING

1. Lonnie Lewis, Petitioner

2. Eckdahl Warehouse Co., Respondent

3. Brotherhood of Teamsters and Auto Truck Drivers, Local No. 85, Respondent

4. Joseph Magnin Company, Inc., and New Magnin, Inc., Respondents. *

*New Magnin, Inc., was merged into Joseph Magnin Company, Inc. On September 16, 1984, Joseph Magnin Company, Inc. filed a petition in the United States Bankruptcy Court for the Northern District of California for relief under Chapter 11 of the Bankruptcy Code (Case No. 3-84-01756 LK). The initiation of the bankruptcy proceeding caused the stay of this action as to respondent Joseph Magnin Company, Inc. To respondent Eckdahl Warehouse Co.'s knowledge, petitioner has obtained no relief from the automatic stay of proceedings against respondent Joseph Magnin Company, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondent Eckdahl Warehouse Co. ("Eckdahl") respectfully prays that this Court deny petitioner Lonnie Lewis' ("Lewis") petition for a writ of certiorari and that it affirm the opinion and judgment issued by the United States Court of Appeals for the Ninth Circuit on June 28, 1984.

OPINION BELOW

The opinion below and the orders of the Trial Court are appended to Lewis' petition. The Court of Appeals affirmed the trial court's orders granting directed verdicts on behalf of all respondents.

JURISDICTION

Lewis properly invokes the Court's jurisdiction in his petition for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Lewis identifies the relevant statutory provisions in his petition for certiorari.

STATEMENT OF THE CASE

Lewis was a truck driver and member of the respondent labor union ("Local 85"). Between December 1971 and October 1979, he was employed by a succession of trucking companies, each of which had been engaged by

respondent Joseph Magnin Company, Inc. ("Magnin") to provide labor for the transportation of Magnin's inventory between its facilities in Los Angeles and its facilities in San Francisco.

As is relevant to this proceeding, Lewis was employed by Eckdahl between 1977 and 1979. In October 1979, Magnin decided for economic reasons to terminate its relationship with Eckdahl and substituted another carrier, Lease Transportation. Since Eckdahl had no other work for Lewis, it laid him off.

While Lewis was on Eckdahl's payroll, Magnin treated him as an Eckdahl employee and not one of its own. The "Driver Service Agreement" between Eckdahl and Magnin provided that Eckdahl would employ drivers and make their services available to Magnin; and that Eckdahl would pay their wages, fringe benefits, insurance, and taxes. It is

undisputed that Eckdahl paid Lewis and bore the other expenses it was required to pay under the Driver Services Agreement.

The Driver Service Agreement also provided that the "employment of said drivers will be consistent with any applicable collective bargaining agreement." Of the two signatories to the Driver Service Agreement, only Eckdahl was a party to a collective bargaining agreement covering the drivers.

After Lewis was laid off by Eckdahl upon its loss of Magnin's business, Local 85, in protest, filed a grievance with the California Bay Area Labor Mangement Committee ("Bay Area Committee"). Although Lewis now asserts in his petition that his work was terminated as a result of a dispute about a reduction in pay, his layoff grievance proceeding was in reality based on a claimed viola-

tion of a section of the National Motor Freight Agreement covering "Changes of Operations." That section required approval to be obtained from a "Change of Operations Committee" before initiating changes in any existing employer operations if such changes would have an adverse impact upon union labor. Since Magnin was never a party to the collective bargaining agreement, Local 85 filed a grievance only against Eckdahl, but at the grievance hearing its representative argued that Magnin and Eckdahl were Lewis' co-employers, each bound by the terms of the agreement.

Ultimately, Lewis' grievance was denied by the Joint Western Area Committee after an appeal from a deadlocked Bay Area Committee. The Joint Western Area Committee's basis for denial was not disclosed.

Thereafter, the instant lawsuit

was initiated. Below, Lewis never disputed that Eckdahl lost Magnin's business and that it had no other work for him. He claimed, however, that Eckdahl could not rely on the grievance proceeding as final, binding, and preclusive of litigation because Local 85 failed to grieve on Lewis' behalf against Magnin as a co-employer covered by the collective bargaining agreement and thereby breached its duty of fair representation to Lewis. Lewis argued that the Driver Service Agreement's requirement that the drivers' employment be "consistent with any applicable collective bargaining agreement" constituted Magnin's assent to be bound by the collective bargaining agreement rather than, as Eckdahl and Magnin both contended, a requirement that Eckdahl observe the terms of any collective bargaining agreements to which it was a signatory.

After six days of hearing in the Federal District Court for the Northern District of California, Local 85, Magnin, and Eckdahl each moved for directed verdicts. Judge Burke granted the motions. As is relevant here, Judge Burke concluded that the evidence failed to establish:

(1) That Local 85 violated its duty of fair representation to Lewis;

(2) That Magnin and Eckdahl were co-employers under the collective bargaining agreement;

(3) That Magnin was a party to or bound by a collective bargaining agreement with Local 85;

(4) That Magnin was prevented by either its Driver Service Agreement or any portion of a collective bargaining agreement from terminating its use of Eckdahl;

(5) That Eckdahl breached any

provision of the collective bargaining agreement; and

(6) That Eckdahl laid off Lewis for any reason other than the loss of the Magnin work and the lack of alternative work.

Judge Burke also found that the Joint Western Area Committee's February 1980 decision on Lewis' grievance was final, binding, and preclusive of this action against Eckdahl and Magnin.

Upon appeal, the Ninth Circuit found, in its unpublished opinion, that Local 85's agent who investigated Lewis' grievance may have made errors in judgment by not filing a grievance against Magnin and by failing to obtain a copy of the Driver Service Agreement. It further found the Local 85 presentation to the Joint Western Area Committee to have been "sketchy" and "casual." The Court concluded, however, that such

"errors" were not "egregious," and did not reflect "reckless disregard" for Lewis' rights sufficient to justify a conclusion that the duty of fair representation was breached.

The Ninth Circuit also rejected Lewis' argument that Magnin cannot rely on the finality of a grievance decision because its conduct amounted to a repudiation of the grievance process. The Court found that, since Lewis' grievance named only Eckdahl and since Magnin was never asked to participate, Magnin's absence did not constitute a repudiation of the collective bargaining agreement remedies.

In his Petition for a Writ of Certiorari, Lewis now seeks this Court's reweighing of the evidence which the Ninth Circuit found insufficient to establish either a breach of Local 85's duty of fair representation or a repudi-

ation of the collective bargaining remedies by Magnin. He also raises, for the first time, an argument that there should be a "deception" exception to the limitation on employee collective bargaining agreement litigation set forth in Vaca v. Sipes, 386 U.S. 171 (1967).

Eckdahl's responses to Lewis' contentions are set forth below. The Court is respectfully requested to bear in mind that none of Lewis' Petition's contentions are directed against Eckdahl. Instead, they concern Local 85 and Magnin, and arise from Lewis' perceptions that Local 85 failed to represent him fairly and that Magnin in some fashon deceived Local 85 with respect to its alleged employment of Lewis.

SUMMARY OF ARGUMENT

In substantial part, Lewis seeks

only this Court's reweighing of the evidence against Local 85 and Magnin. To reach the conclusions Lewis urges with respect to the fair representation issue, this Court would need to decide that the Ninth Circuit misweighed the undisputed evidence and to substitute its own judgment that Local 85's errors in judgment went beyond simple negligence into the realms of arbitrariness, discrimination, or bad faith. Similarly, this Court would have to reweigh undisputed evidence to conclude that Magnin did not "repudiate" the grievance process when it did not attend a grievance proceeding in which it was not even named as a respondent. The Courts of Appeals should be the courts of last resort for such factual determinations.

With respect to Lewis' new issue, not raised in his appeal to the Ninth Circuit, there is no public policy

basis for a "deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements. The existing rule is sufficiently broad to afford relief against "deceptive" employers in any case where the relief is justified by the record.

Finally, even if certiorari is granted as to the directed verdicts in favor of Local 85 and Magnin, the Court should not disturb the directed verdict in favor of Eckdahl. There is no dispute that Eckdahl lost the work which Lewis performed as its employee and that no substitute work was available. Even if Local 85 is found to have breached its duty of fair representation in failing to name Magnin as a respondent in the grievance proceeding, or Magnin is

found to have repudiated the collective bargaining process, it is undisputed that Local 85 proceeded against Eckdahl, that Eckdahl went through the grievance required by its agreement with Local 85, and that Eckdahl established to the satisfaction of the decisional body hearing the grievance that it did not breach the collective bargaining agreement when it laid off Lewis. Therefore, regardless of the disposition of this case as to other respondents, no basis has been presented for a changed rule or result in Eckdahl's case.

REASONS FOR DENYING THE WRIT

1. This Court Is Merely Being Asked To Substitute Its Weighing Of The Facts For That Of The Ninth Circuit.

In his petition, Lewis asserts that the decision below was in conflict with this Court's decision in Vaca v. Sipes, supra. As Lewis asserts, Vaca v. Sipes sets forth the standard that is to be

followed in determining whether an employee covered by a collective bargaining agreement can obtain judicial review of a breach of contract claim despite a failure to secure relief through the collective bargaining agreement's remedial procedures. This Court identified two circumstances in which an employee would not be precluded from instituting a lawsuit against its employer:

(i) When the employee has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process his grievance; or

(ii) When the conduct of the employer amounts to a repudiation of the contractual procedures in the collective bargaining agreement. Vaca v. Sipes, supra, 386 U.S., at 185.

While Lewis contends that the Ninth Circuit missaplied the Vaca v. Sipes standards, his supporting argument merely asks this Court to dispute the weighing of the evidence by the Court of Appeals. At pages 16 through 17 of the petition, for example, Lewis points out that the Ninth Circuit found there may have been "errors in judgment by not filing a grievance against Magnin...." but this, and "other union errors," were deemed insufficient to constitute a breach of the duty of fair representation. Lewis' petition urges this Court to reach a contrary result, but he identifies no reasons of law or policy that compel rejection of the Circuit Court's analysis of this issue.

Similarly, Lewis attacks the Circuit Court's evaluation of the repudiation evidence and asks this Court to weigh it differently. It

is at least arguable that the repudiation issue is not one critical to the Ninth Circuit's review of the District Court's directed verdicts, since the Circuit Court did not disturb Judge Burke's findings that Magnin and Eckdahl were not Lewis' co-employers and that Magnin was not bound by the terms of the collective bargaining agreement. Without Magnin having been held obligated to follow the grievance procedures, it cannot sensibly be understood to have "repudiated" them. Assuming, however, for the sake of argument that there is valid issue of repudiation presented, Lewis nowhere suggests that the Ninth Circuit applied the wrong legal or public policy standards, but, instead, complains that it relied on different evidence than Lewis would have preferred.

While it is clear that this Court

can review cases turning only on factual issues under Rule 17, it has been, historically, reluctant to so do:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.... [W]e should "adhere to the usual rule of non-interfernce where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

For the most part, Lewis' contentions are, in the final analysis, nothing more than a request to this Court to find the record tilting one way rather than the other, and certiorari should not be granted.

2. Petitioner Identifies No Valid Basis For Creating An Exception To The Rule Of Vaca v. Sipes For "Employer Deception."

In his petition, Lewis raises an argument not previously heard in this proceeding, i.e., there should be an exception to the rule of Vaca v. Sipes where an employer has engaged in deception to conceal the fact of employment and thereby denies contractual liability. In such a case, Lewis urges, the employee should not be required to establish a breach of the union's duty of fair representation before initiating litigation against the putative employer.

No compelling reason has been identified by Lewis for the creation of such an exception, and there clearly is no factual basis in the present record for it: First, Local 85 was certainly not "deceived" by Magnin about its relationship with Eckdahl or Lewis, since, it is

undisputed, Local 85 in fact raised the co-employer issue during the grievance proceeding, despite Magnin's never having been a respondent. Secondly, the overwhelming weight of the record is that Magnin was not, in fact, a co-employer subject to any claims under the collective bargaining agreement and that Lewis could not successfully prosecute such a claim even if certiorari were granted and the sought exception created. Thirdly, Magnin's bankruptcy will, in the ordinary course, extinguish through discharge any indebtedndess which Magnin may have to Lewis as a result of the alleged applicability of the Local 85 collective bargaining agreement and the automatic stay will preclude further litigation against Magnin. In short, if there is an appropriate set of circumstances for a "deception" exception

to the rule in Vaca v. Sipes, this case does not present it.

Similarly, the existing rule is broad enough to encompass employers which have engaged in deception. In any conceivable case where an employee could establish, through litigation, that a putative employer is, in fact, the actual employer notwithstanding a deception concerning its status, the employee himself, prior to institution of union grievance procedures, will have sufficient awareness of the relationship with the alleged employer to call to his union's attention all of the facts giving rise to the contention that a co-employer exists. At that point and depending upon the circumstances, the union will have several options available to it, including actually naming the putative employer as a respondent in the grievance pro-

ceeding; filing an action with the National Labor Relations Board to declare the non-signatory to have engaged in an unfair labor practice and for a determination that is bound by the collective bargaining agreement, compare Krantz Wire & Mfg. Co., 97 NLRB 971 (1952); or bringing an action under Section 301 of the National Labor Relations Act to obtain a declaratory judgment that the putative employer is bound by the terms of the agreement, compare Heavy Cont'rs Assn. v. International Hod Car, L. No. 1140, 312 F. Supp. 1345, 1346 (D.C. Neb. 1966) (Court may hear declaratory relief matters under Section 301). Therefore, contrary to Lewis' assertions, the employee is not without a remedy in any circumstance in which a valid breach of contract action could logically be asserted against a

deceptive employer, since the union, in its discretion, could undertake those steps which would result in a determination of co-employer status in appropriate cases. These steps can easily be taken either prior to the institution of the grievance procedures required under the collective bargaining agreement or through the procedures themselves. Of course, the union has significant discretion to determine whether it will pursue a particular remedy so long as it acts in good faith when exercising that discretion. Humphrey v. Moore, 375 U.S. 335, 342 (1964). If the union's discretionary failure to explore a particular remedy against a deceptive employer constitutes an "egregious" error, the employee retains the option of instituting litigation against the employer on the grounds the union breached its duty of fair representation.

In short, no valid reason has been advanced in this case for a departure from the existing well-defined rule. The overwhelming evidence of the case is that, even if Lewis were permitted to sue Magnin notwithstanding the latter's bankruptcy, it could not establish a co-employer relationship. Further, under Vaca v. Sipes, there are as many remedies available to an employee "deceived" as to employer status as there are for any other employee and no valid policy grounds have been identified as a basis for a different rule in this narrow class of cases.

3. As To Eckdahl, Lewis Asserts No Basis Whatsoever For Granting The Writ.

A close reading of Lewis' entire petition fails to disclose any basis whatsoever for granting of a writ of certiorari with respect to the directed verdict issued on Eckdahl's

behalf by Judge Burke. It is undisputed that Eckdahl, as a signatory to the collective bargaining agreement with Local 85, was required to submit to the grievance process and that, in fact, Eckdahl did all that was required of it by the collective bargaining agreement. It is also undisputed that Eckdahl established to the satisfaction of the committee hearing the grievance that Lewis' employment was terminated because Eckdahl lost Magnin's business and there was no substitute work available. The fair representation, repudiation, and deception issues raised by Lewis concern only the actions of other respondents. In short, nothing urged by Lewis or otherwise before the Court would require disturbance of the trial court's directed verdict in Eckdahl's favor.

CONCLUSION

For the reasons set forth in this brief in opposition, Lewis' Petition for Writ of Certiorari should be denied and the opinion of the Ninth Circuit affirmed, particularly, insofar as it concerns Respondent Eckdahl.

Respectfully submitted,

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December 3, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this third day of December, 1984, three copies of Respondent Eckdahl Warehouse Co.'s Brief In Opposition to Petition For A Writ of Certiorari were mailed, postage prepaid, to counsel for each party, addressed as follows: Dennis Steven Weaver, Suzanne M. McDonnell, McDonnell & Weaver, 4091 - 24th Street, San Francisco, California 94114-3789; Maureen E. McClain, Littler, Mendelson, Fastiff & Tichy, 650 California Street, 20th Floor, San Francisco, CA 94108; Duane B. Beeson, Beeson, Tayer & Silbert and Rosenthal & Leff, Inc., 100 Bush Street, Suite 1500, San Francisco, CA 94104-3982.

I further certify that all parties required to be served have been served.

_____

Michael S. Rubin

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